



United States Department of the Interior

OFFICE OF THE SECRETARY
Washington, D.C. 20240

AA-85085
1864 (AK-932)

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

DECISION

State of Alaska	:	AA-85085
Department of Natural Resources	:	Recordable Disclaimer of Interest Application
Attn: Tom Irwin, Commissioner	:	
550 West Seventh Avenue, Suite 1400	:	
Anchorage, Alaska 99501-3579	:	Porcupine River

ADMINISTRATIVE WAIVER GRANTED APPLICATION APPROVED, IN PART APPLICATION REJECTED, IN PART APPLICATION DENIED, IN PART

On December 10, 2003, the State of Alaska (State) filed an application for a recordable disclaimer of interest (AA-85085), under the provisions of Sec. 315 of the Federal Land Policy and Management Act of October 21, 1976, 43 U.S.C. §1745, and the regulations contained in 43 CFR Subpart 1864, for certain lands underlying the Porcupine River. The State of Alaska has made this application on the grounds that title has passed by operation of law from the United States to the State of Alaska on January 3, 1959, the date of Alaska's statehood.

BACKGROUND

The Submerged Lands Act of 1953, 43 U.S.C. §1311(a), granted and confirmed to the states title to the lands beneath inland navigable waters within the boundaries of the respective states. It also gave the states the right and power to manage, and administer these lands in accordance with state law. Section 6 (m) of the Alaska Statehood Act, July 7, 1958, made the Submerged Lands Act applicable to Alaska.¹

¹ 72 Stat. 339, 343

Section 315(a) of the Federal Land Policy and Management Act (FLPMA) authorizes the Secretary of the Interior to issue a document of disclaimer of interest(s) in any lands in any form suitable for recordation, where the disclaimer will help remove a cloud on the title of such lands and where she determines a record interest of the United States in lands has terminated by operation of law or is otherwise invalid.

The State applied for the bed of the Porcupine River from its mouth at the Yukon River to a point between monuments 50 and 51 on the United States-Canada International Boundary. The State also applied for lands underlying Rock Slough, Middle Channel, Henderson Slough, Joe Ward Slough, Sixmile Slough, Nine Mile Slough, and Curtis Slough, as well as lands underlying "all interconnecting sloughs between the lines of ordinary high water" of the Porcupine River.

Pursuant to 43 CFR 1864.1-2(c)(1) and (d), unless a waiver is granted, a legal description of the lands for which a disclaimer is sought must be based on either an official United States public land survey or a metes and bounds survey tied to the nearest corner of an official public land survey. On December 10, 2003, the State requested a waiver of this requirement under 43 CFR 1864.1-2(d). It is determined that a survey description of the subject water bodies is not needed to adjudicate the State's application, and the waiver is hereby granted, provided the term "interconnecting sloughs," is not contained in the legal description of the recordable disclaimer of interest.

In support of its application, the State noted that the Washington Treaty of May 8, 1871, ratified by the United States and Great Britain, "permanently established navigation rights 'for the purposes of commerce' on the Porcupine River for Britons and Americans." In addition, the State submitted a letter (May 13, 1974) in which the Bureau of Land Management (BLM) identified inland water bodies in Alaska including the Porcupine River, that would probably meet the federal definition of navigability. The State also submitted a BLM memorandum (April 21, 1983) which identified specific navigable waters within the Upper Yukon Region. The State's evidence addressed the Porcupine River; however, the State did not submit information on the navigability or hydrology of the sloughs, named or unnamed, on or about January 3, 1959.

The lands applied for are located entirely within the exterior boundaries of the Arctic National Wildlife Refuge and the Yukon Flats National Wildlife Refuge, both managed by the United States Fish & Wildlife Service (USFWS). The United States and Native corporations (Gwichyaa Zhee Corporation of Fort Yukon and Doyon, Ltd.) are the primary upland owners.² Both Chalkyitsik Corporation and Canyon Village have pending selections of uplands along the Porcupine River that have not yet been adjudicated. There are also a number of Native allotments along the river. These allotments are restricted lands. The granting of the State's application for a recordable disclaimer of interest to submerged lands underlying navigable portions of the Porcupine River does not include any restricted lands and, therefore, is not subject to the regulatory prohibition.³

² The surface and subsurface were either interim conveyed or patented to Gwichyaa Zhee Corporation, a village corporation, and Doyon, Ltd., a regional corporation, respectively, or were conveyed in its entirety to Doyon, Ltd.

³ The BLM will not approve any part of an application that pertains to trust or restricted Indian lands (43CFR1864.1-3(b)(2)).

Notice of the State's application, including the grounds for supporting it, was published in the Federal Register on March 9, 2004. In June, 2004, the BLM received written comments from the USFWS, Gwitchyaa Zhee Corporation, Gwitchyaa Gwich'in Tribal Government, and the Trustees for Alaska. In general, the comments pertained to process, potential impacts to property rights, or land and resource management issues. On June 30, 2004, the BLM responded to Gwitchyaa Gwich'in Tribal Government, specifically addressing their comments and questions; and in letters dated July 1, 2004, the BLM informed Doyon, Ltd., Chalkyitsik Native Corporation, Gwitchyaa Zhee Corporation, and the Trustees for Alaska, of the pending completion of a draft navigability report on the Porcupine River.

On August 23, 2004, the BLM posted a copy of its draft navigability report for the Porcupine River on the BLM - Alaska website. The BLM also provided copies of the report to the State of Alaska, the USFWS, Doyon, Ltd., Chalkyitsik Native Corporation, Gwitchyaa Zhee Corporation, and Gwitchyaa Gwich'in Tribal Government. The BLM invited their review and comments and offered them an opportunity to provide additional information. Interested parties were afforded an additional 30-day comment period, ending September 24, 2004.

The BLM received three formal comments on the draft navigability report; however, none included factual evidence to support or contradict a finding of navigability. Doyon, Ltd. responded with no comment. The State requested that the BLM approve the State's application for those interconnecting sloughs determined to be navigable, including those specifically named. The USFWS expressed concern over the identification and description of lands applied for by the State. The USFWS noted that the State has the regulatory requirement to provide a legal description based upon a public land survey or a metes and bounds survey. The USFWS did not dispute the finding of navigability of the Porcupine River, and agreed with the BLM's position on "interconnecting sloughs." All of the comments have been analyzed and considered.

The BLM prepared a comprehensive review of the lands applied for, and on November 16, 2004, issued a final navigability report which discussed the land status, previous conveyance actions by the BLM, the physical character of the Porcupine River, and historical uses of the Porcupine River for travel, trade, and commerce.⁴ The report focused on historical evidence of commercial navigation on the Porcupine River.

After reviewing the State's application, land status, the historic record, and legal guidance on title navigability, the BLM concluded that the Porcupine River from the United States-Canada International boundary to its confluence with the Yukon River was navigable at the time of statehood. Proclamation 810 (June 15, 1908) set apart those unpatented lands lying within sixty feet of the boundary line between the United States and the Dominion of Canada. Proclamation 1196 (May 3, 1912) reserved those lands to the federal government to retain complete control of use and occupancy of all public lands within said sixty feet. Therefore, title to this sixty foot strip did not pass to the State at the time of statehood. The remaining lands underlying the river were not reserved at the time of statehood.

⁴ The State's application, supporting evidence, and the BLM navigability report can be found on BLM - Alaska's website.

The BLM lacked sufficient information on the navigability and hydrology of named and unnamed interconnecting sloughs to make a navigability determination. Nevertheless, if water from a navigable river flowed through an interconnecting slough at the time of statehood, then the slough is considered to be an integral part of the river and the State would hold title to the lands underlying the slough. If the river no longer flows through the slough as a result of erosion, accretion, or reliction, then the upland owners own the bed of the former slough. None of the sloughs were specifically identified in the State's application as a potential highway of commerce; rather, they were identified as parts of the Porcupine River.

In assessing the navigability of inland water bodies, the BLM relies upon federal administrative and case law and the advice of the Interior Department's Solicitor's Office. The classic definition of navigable waters is found in *The Daniel Ball*, 77 U.S. (10 Wall.) 557 (1870). Pertinent DOI Office of the Solicitor's opinions include Associate Solicitor Hugh Garner's memo of March 16, 1976 ("Title to submerged lands for purposes of administering ANCSA") and Regional Solicitor John Allen's memo of February 25, 1980 ("Kandik, Nation Decision on Navigability"). The agency is also guided by the Submerged Lands Act of 1953 and the Submerged Lands Act of 1988 (P.L. 100-395).

The Submerged Lands Act of 1988 provides that the "execution of an interim conveyance or patent, as appropriate, by the Bureau of Land Management which conveys an area of land selected by a Native or Native Corporation which includes, surrounds, or abuts a lake, river, or stream, or any portion thereof, shall be the final agency action with respect to a decision of the Secretary of the Interior that such lake, river, or stream, is or is not navigable, unless such a decision was validly appealed to an agency or board of the Department of the Interior on or before December 2, 1980."⁵

APPLICATION APPROVED, IN PART

The United States affirms it has no interest in the lands described below because all of the federal interests passed to the State of Alaska at the time of statehood. Approving the State's application for a recordable disclaimer of interest will remove a cloud on the title by providing certainty about the ownership of submerged lands underlying the Porcupine River. Without this certainty, ownership between the two sovereigns, the State of Alaska and the United States, is unclear. This lack of clarity of sovereign ownership greatly complicates the application of natural resources laws and other laws to the submerged lands involved. Resolving clouds on title between the State of Alaska and the United States is thus of even greater importance than resolving title between a private party and the United States.

Accordingly, based on the foregoing and the documentation contained in the case record, I have determined that the State's application for a recordable disclaimer of interest is legally sufficient within the provisions of Section 315 of FLPMA and the regulations contained in 43 CFR Subpart 1864. The State's application for a recordable disclaimer of interest is hereby approved as follows:

⁵ The Submerged Lands Act of 1988, Section 101, amended the Alaska National Interest Lands Conservation Act (P.L. 96-487) Section 901 (c)(1).

The lands underlying Porcupine River, between the lines of ordinary high water marks on its banks, from its confluences with the Yukon River upstream approximately 214 river miles to the 60-foot wide neutral strip from the United States - Canada International Boundary, presently located in the following townships: Tps. 20 N., Rs. 10, 11 and 12 E.; Tps. 21 N., Rs. 11, 12, 13, and 14 E.; Tps. 22 N., Rs. 13, 14, 15, 16, and 17 E.; Tps. 23 N., Rs. 15, 16, 17, 18, and 19 E.; Tps. 24 N., Rs. 18, 19, and 20 E.; Tps. 25 N., Rs. 19, 20, 21, 22, and 23 E.; Tps. 26 N., Rs. 23 and 24 E.; Tps. 27 N., Rs. 24, 25, 26, 27, and 28 E.; Tps. 28 N., Rs. 25, 26, 27, and 28 E.; Tps. 29 N., Rs. 28, 29, and 30 E.; and T. 30 N., R. 30 E., Fairbanks Meridian, Alaska.⁶

APPLICATION REJECTED, IN PART

In view of the fact that there is insufficient information regarding their hydrology or navigability, the BLM is unable to make a determination regarding the State's application for lands underlying the named sloughs at this time. Therefore, the United States rejects the State's application for the lands underlying Curtis Slough, Ninemile Slough, Sixmile Slough, Joe Ward Slough, Henderson Slough, Rock Slough, and the Middle Channel for lack of supporting facts.

APPLICATION DENIED, IN PART

The BLM denies the State's application for those lands lying within the sixty foot wide strip between the United States and the Dominion of Canada. These lands were reserved to the federal government to retain complete control of use and occupancy of all public lands within said sixty feet. Therefore, title to lands within this sixty foot strip did not pass to the State at the time of statehood.

CONCLUSION

Based on the foregoing, and the documentation contained in the case record, I have determined that the recordable disclaimer of interest is legally sufficient with the provisions of section 315 of the Federal Land Policy and Management Act of October 21, 1976, 43 U.S.C. §1745, and the regulations contained in 43 CFR Subpart 1864.

This decision constitutes the final administrative determination of the Department of the Interior.

I hereby instruct the Bureau of Land Management Alaska State Director to issue a recordable disclaimer of interest in accordance with my decision.

APPROVED:


Rebecca W. Watson
Assistant Secretary - Land and Minerals Management

5/6/05
Date

⁶ The 60-foot wide neutral strip was withdrawn and reserved under Proclamation 810 (June 15, 1908) and Proclamation 1196 (May 3, 1912).

Enclosure:

1- Recordable Disclaimer of Interest (2 pp)

Copy furnished:

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